Supreme Court, U.S.
FILED
FEB 18 1993
OFFICE OF THE CLERK

No. 92-1085

In the Supreme Court of the United States

OCTOBER TERM, 1992

MARYLAND AND VIRGINIA MILK PRODUCERS COOPERATIVE ASSOCIATION, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly rejected allegations of preindictment delay where the court found that the government had diligently investigated and prosecuted the case and had not sought any tactical advantage from the delay.

2. Whether the government was required to turn over to petitioner the interview notes of a government witness where both courts below, after *in camera* inspections, concluded that the notes contained neither Jencks Act statements nor undisclosed *Brady* material.

3. Whether the court of appeals correctly concluded that the Sherman Act conspiracy continued until the summer of 1987 and that its prosecution thus was not barred by the statute of limitations.

4. Whether the court of appeals' conclusion that petitioner had "devised a scheme to defraud the City of Newport News of money or property and used the mails to further the scheme" conflicts with this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is unpublished, but the judgment is noted at 974 F.2d 1333 (Table).

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1992. A petition for rehearing was denied on October 6, 1992. Pet. App. 37a. The petition for a writ of certiorari was filed on December 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiring to rig bids for the supply of milk and other dairy products to Virginia public schools between 1984 and 1987, in violation of the Sherman Act, 15 U.S.C. 1, and two counts of mail fraud, in violation of 18 U.S.C. 1341. Pet. App. 2a. Petitioner was sentenced to pay a fine of $1,000,000 on the Sherman Act count and $50,000 on each of the mail fraud counts.

1. Petitioner is an agricultural corporation owned and operated by approximately 1,400 dairy farmers who produce milk in Delaware, Maryland, Pennsylvania, Virginia, and West Virginia. One of petitioner's divisions, the Marva Maid Dairy, converts raw milk into processed milk, butter, cream, and similar products for sale to commercial, military, and school customers in the Tidewater and Colonial Heights-Petersburg markets of Virginia. Pet. App. 3a.

Public schools in the Commonwealth of Virginia purchase half-pint cartons of milk for school lunches on the basis of competitive bids. Bids must be submitted in sealed envelopes, and most school districts in Virginia require each signed bid to include an affirmation that the bid is not the result of collusion or agreement with any other bidder. Contracts are awarded to the lowest bidder in the spring or summer of each year. Each contract usually runs for a period of 12 months beginning in late summer. Pet. App. 4a.

The evidence at trial showed that petitioner agreed with a competitor, Pet Dairy, Inc., to rig the bids for

school milk contracts for the school years 1984-1985, 1985-1986, and 1986-1987. Charles Elliott, the manager of petitioner's Marva Maid division from September 1983 to December 1986, testified that he met with Douglas Stamper and Lawrence Altaffer of Pet Dairy to rig the contracts, and that he did so with the approval of at least one other of petitioner's managers. Stamper and Altaffer also testified at trial, and they corroborated Elliott's account. Pet. App. 4a-7a & n.6, 26a.

Elliott first met with representatives of Pet in the spring of 1984. At that meeting, Elliott and Pet's representatives reviewed the school contracts that petitioner and Pet then held, and they agreed that each company would keep its current contracts for the following year, except that petitioner's Marva Maid division would be the low bidder for the Williamsburg contract, a contract then held by Pet. Pet agreed to submit high bids on the contracts allocated to petitioner's Marva Maid division, and petitioner agreed to bid high on the contracts allocated to Pet. Pet. App. 6a. It was understood that the agreement would continue beyond the 1984-1985 school year, subject to confirmation each year. *Ibid.* Following that 1984 meeting, petitioner's Marva Maid division was awarded the Williamsburg contract, and Pet and petitioner's Marva Maid division otherwise retained the contracts they had previously held. *Ibid.*

Elliott and Stamper later twice confirmed their bid-rigging agreement for each of the 1985-1986 and 1986-1987 school years. Pet. App. 6a-7a. Petitioner and Pet submitted bids in accordance with the secret

agreements for each of those years, and each won its assigned contracts. The payments obtained by petitioner as a result of the bid-rigging scheme included two checks that were mailed by the City of Newport News, Virginia, for the performance of the 1985-1986 and 1986-1987 school lunch contracts. The checks were mailed in September 1986 and March 1987, respectively. *Id.* at 7a.

2. Prior to trial, petitioner moved for the production of exculpatory materials in the government's possession pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963). The government responded by informing petitioner that, during an interview conducted by prosecutors on April 2, 1987, Elliott had stated that "he had no basis to believe [that] there had been collusion on school bids." Pet. App. 10a. Petitioner also moved before trial for the production of any notes taken by prosecutors during their investigative interviews of Elliott. The government opposed that motion because the interview notes did not reflect verbatim statements by Elliott, but merely the prosecutors' impressions, and because the government had not yet determined whether to call Elliott as a witness. The court denied petitioner's motion. When Elliott was called by the government at trial, petitioner again sought disclosure of the notes. The government argued that it had made all the disclosures that were required by *Brady* and the Jencks Act, 18 U.S.C. 3500. The court again denied petitioner's motion. After the jury returned a guilty verdict, the district court examined the notes *in camera* and ruled that there was "no basis in law or fact" for ordering their production. Pet. App. 10a-11a.

3. The court of appeals affirmed. The court of appeals first rejected petitioner's claim that its due process rights were violated by the government's delay in seeking and obtaining an indictment. Pet. App. 11a-14a. The court noted that in order to succeed on its due process claim, petitioner bore the burden of showing both "actual prejudice" from the delay and "that the delay, balanced against the reasons for the delay proffered by the government, offends 'fundamental conceptions of justice' or 'the community's sense of fair play and decency.' " *Id.* at 11a.

The court concluded that petitioner had established neither element. As to the first, the court rejected petitioner's contention that it had been prejudiced by its inability to interview Elliott after petitioner fired him in 1986, and by its own innocent destruction of certain bid documents. The court noted that petitioner had "every opportunity to question Elliott at length at trial." Pet. App. 12a. In addition, the court explained that "other than its bald assertion that it lost key and essential documents," petitioner had failed to identify "any *specific* documents that prejudiced its case or prevented it from piecing together the bid workups from the years at issue, or the years that preceded the conspiracy," especially since "the bid documents in question were available from school districts to which the bids were submitted." *Id.* at 12a-13a.

As to the second element, the court noted that antitrust conspiracy investigations are inherently lengthy, and that in this case the government had been especially hampered by the initial false denials of any bid-rigging on the part of Elliott and other dairy

officials. Pet. App. 13a. Because "Elliott's 180-degree turn provided the primary catalyst in the return of the later indictment" and because the government "diligently investigated and prosecuted the case thereafter," the court concluded that the government had not impermissibly delayed its prosecution in order "to gain a tactical advantage over the accused." *Id.* at 13a-14a.

The court of appeals next rejected petitioner's claim that the government should have disclosed to the defense the notes the prosecutors took during their investigatory interviews of Elliott. Like the district court, the court of appeals reviewed the notes *in camera* and concluded that "the government met its obligation under *Brady* by providing all of the exculpatory and impeachment evidence it possessed." Pet. App. 18a. The court also concluded that disclosure of the notes was not required by the Jencks Act, 18 U.S.C. 3500. The court noted that a prosecutor's "[i]nterview notes are not Jencks Act statements unless the witness signed or otherwise adopted or approved the notes," or unless they are a "substantially verbatim" rendition of the witness interview. Pet. App. 21a. Here, "[o]n cross-examination, the defense tried (but to no avail) to develop a theory that Elliott had adopted or approved the notes," but was unable to "create an adequate foundation that would necessitate further inquiry" or even "a scintilla of evidence demonstrating that Elliott even tacitly adopted or approved the notes." Pet. App. 21a, 23a.

Finally, the court of appeals rejected petitioner's arguments that the Sherman Act charge was barred

by the statute of limitations and that the mail fraud counts were invalid under this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987). With respect to the statute of limitations, the court found that the government had "presented evidence that the conspiracy had its origins early in 1984 and that Elliott and Stamper agreed in 1986 to continue the bid rigging agreement for the 1986-1987 school year," which brought the conspiracy well within the five-year limitations period applicable to that charge. Pet. App. 24a-25a. With respect to petitioner's *McNally* argument, the court noted that Elliott testified that "absent the agreement with Pet Dairy, the bids submitted to the school districts would have been lower," and thus there was "ample evidence that [petitioner] devised a scheme to defraud the City of Newport News of money or property and used the mails to further the scheme." Pet. App. 31a-32a.[1]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioner first renews its contention that its due process rights were violated because the government purportedly waited "more than seven years" after petitioner committed "the basic Sherman

[1] The court of appeals also rejected numerous other arguments made by petitioner, including challenges to the sufficiency of the evidence (Pet. App. 27a-28a), the adequacy of the jury charge (*id.* at 32a-34a), and the propriety of the sentence (*id.* at 34a-36a). Petitioner does not renew those arguments in this Court.

Act offense in the Spring of 1984" before obtaining an indictment. Pet. 13-17. That contention is both factually and legally flawed. First, petitioner significantly exaggerates the length of the relevant delay because, as the court of appeals found (Pet. App. 24a-25a), petitioner actively continued its participation in the bid-rigging conspiracy through the 1986-1987 school year. Second, the court of appeals correctly concluded that any delay in indicting petitioner was fully justified by the fact that petitioner's officers and their co-conspirators initially denied any knowledge of bid-rigging, which left the government with insufficient evidence to indict. Pet. App. 13a.

As this Court has recognized, a claim of pre-indictment delay must be rejected where the delay at issue was necessary for the government to determine that a prosecution was justified and to assemble sufficient evidence to prove guilt beyond a reasonable doubt. *United States* v. *Lovasco*, 431 U.S. 783, 795 (1977); see also *United States* v. *Gouveia*, 467 U.S. 180, 192 & n.7 (1984).[2] No different rule is appropriate in this case, especially in light of petitioner's failure

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[2] Petitioner contends (Pet. 17) that the decision below warrants review because, in conflict with another recent Fourth Circuit decision, the court held that due process is not violated unless the government intentionally delays an investigation to gain a tactical advantage. This Court, however, does not grant certiorari to review alleged conflicts between different panels of the same court of appeals. *Wisniewski* v. *United States*, 353 U.S. 901 (1957). In any event, the decision below is consistent with this Court's decision in *Gouveia* (467 U.S. at 192-193) and, as the court of appeals recognized, with the decisions of other circuits that have considered the issue. See Pet. App. 14a.

to carry its burden of demonstrating that it suffered specific prejudice as a result of the delay. While petitioner contests the correctness of that conclusion in this Court (see Pet. 15-17), that essentially factual determination by the court of appeals, see Pet. App. 12a, does not warrant further review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

2. Petitioner next contends that the government violated its *Brady* obligations and the Jencks Act, 18 U.S.C. 3500, by failing to produce the prosecutors' notes of their interviews of Elliott. Pet. 18-23. Petitioner's *Brady* claim fails because, as petitioner acknowledges (Pet. 5), the government disclosed to the defense the very fact that petitioner claims was essential to its defense—that Elliott initially claimed that no bid-rigging took place. See Pet. 21. While petitioner speculates that the notes may have contained additional impeachment information, that unadorned speculation casts no doubt on the court of appeals' conclusion, after reviewing the notes *in camera*, that "the government met its obligation[s] under *Brady* by providing all of the exculpatory and impeachment evidence it possessed." Pet. App. 18a.[3]

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[3] Petitioner also bases its *Brady* claim (Pet. 20) on a government memorandum (Pet. App. 63a-65a) that petitioner presented for the first time as an appendix to petitioner's rehearing petition in the court of appeals. That document explains that Elliott accused petitioner of other crimes, which the government ultimately chose not to prosecute because it was unable to obtain independent corroboration for those specific allegations. Contrary to petitioner's claim (Pet. 20), the memorandum does not suggest that prosecutors believed those other charges were "concocted" or "baseless." The memorandum merely reflects the government's practical

There is no greater force to petitioner's alternative argument that the notes should have been disclosed pursuant to the Jencks Act. Pet. 22-23. The Jencks Act provides that "[a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement * * * of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. 3500(b). The Act strictly limits what qualifies as a discoverable "statement." Other than the witness's grand jury testimony, it encompasses only "a written statement made by said witness and signed or otherwise adopted or approved by him" or a transcription of "a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement." 18 U.S.C. 3500(e); see also *Goldberg* v. *United States*, 425 U.S. 94, 105 (1976) ("writings must be produced only to the extent they are 'statements' as defined"); *Palermo* v. *United States*, 360 U.S. 343, 350 (1959) (policy of the Act is not to permit impeachment based on statements "which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations").

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reluctance to prosecute unless corroborating evidence could be found. Nor does the memorandum suggest that the government "hid" from petitioner the fact that "Elliott had been carrying a grudge." Pet. 20. Having fired Elliott, petitioner was well aware of that fact. In fact, petitioner questioned Elliott extensively about his alleged bias at trial. Tr. 440-443, 459-463, 485-495.

As the court of appeals concluded, petitioner failed to develop even "a scintilla of evidence demonstrating that" the notes qualified as Jencks Act "statements." Pet. App. 20a-23a. Thus, the threshold requirement for disclosure under the Jencks Act was absent. That fact distinguishes this case from *Goldberg* v. *United States*, *supra*, on which petitioner relies. In *Goldberg*, the government conceded that the prosecutors' notes fit within the Jencks Act definition of a "statement" because the witness had testified that he had reviewed and corrected them as they were being taken. 425 U.S. at 100-101. The issue in *Goldberg* was whether the government's claim of privilege could defeat the required disclosure of notes that otherwise fell within the reach of the Jencks Act. Because the notes in this case were not Jencks Act "statements," *Goldberg* does not help petitioner's cause.[4] In any event, as the court of appeals recognized after its own *in camera* review (Pet. App. 23a n.8), even if the Jencks Act required production of the notes, any error in failing to produce them was harmless because nothing in the notes would have aided the defense.

3. Petitioner next argues (1) that the court's jury instruction on the statute of limitations was

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[4] Petitioner contends that some of the Elliott interview notes were disclosed to the defendant in a related prosecution, *United States* v. *Hughes*, Cr. No. 92-25-N (E.D. Va. Apr. 23, 1992). Pet. 20. In that case, one of the government attorneys who took notes testified as a government witness. The government disclosed the notes taken by that attorney because the court held that the notes were Jencks Act statements *of that attorney*.

erroneous because it failed to place the burden of proof on this issue on the government and (2) that the government failed to prove that the conspiracy continued into the statutory period. Pet. 24-25. Petitioner did not raise a burden of proof objection to the statute of limitations instruction in the district court, however, and thus waived any objection to that instruction in the absence of plain error. There was no plain error in this case. In fact, the jury was instructed that "to find the defendant guilty of violating the Sherman Antitrust Act you must find beyond a reasonable doubt that it was a member of the conspiracy at some time after July 30, 1986." Tr. 1043. There is simply no basis in the record for petitioner's claim that the court charged the jury that the defendant had the burden of proof on this issue. Pet. 24.

Petitioner's claim that the evidence does not support the finding that the conspiracy continued past July 30, 1986, ignores the evidence that Elliott and Stamper confirmed their agreement for the 1986-1987 school year and that each delivery of milk and each payment received for that milk during that school year at the rigged price was an act in furtherance of the conspiracy. Pet. App. 25a. Moreover, while Elliott left petitioner's employ late in 1986 (*within* the statute of limitations period), the evidence showed that his successor, Thomas Neale, condoned the bid-rigging and knowingly continued petitioner's involvement in the conspiracy after Elliott's departure. Pet. App. 24a-26a. Petitioner's fact-bound disagreement with the conclusions of the district court and the court of appeals concerning the

sufficiency of the evidence on this issue does not warrant further review by this Court.

4. Finally, petitioner contends that its mail fraud convictions are inconsistent with *McNally* v. *United States*, 483 U.S. 350 (1987), which held that the mail fraud statute under which petitioner was convicted is limited to the protection of money or property rights. Petitioner's claim is based on an erroneous view of the indictment, evidence, and jury instructions. Consistent with this Court's decision in *McNally*, the indictment alleged that petitioner "devised and intended to devise a scheme and artifice to defraud the City of Newport News of money and property." Pet. App. 31a. The evidence amply established that allegation by showing that the bids received by the school districts would have been lower in the absence of petitioner's fraudulent bid-rigging scheme. *Ibid.* In addition, the jury was properly instructed that to convict on the mail fraud counts it had to find, *inter alia*, that petitioner "knowingly participated in a conspiracy to deprive the City of Newport News of money or property." *Ibid.* On this record, petitioner's *McNally* challenge lacks merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1993